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No. 89-1080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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The National Education Association (NEA), with the consent of the parties, submits this brief *amicus curiae* in accordance with the Rules of this Court.[1]

INTEREST OF THE AMICUS CURIAE

NEA is a nationwide employee organization with a current membership of more than two million members, the vast majority of whom are employed by public school districts, colleges and universities.

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[1] Pursuant to Rule 37, copies of the letters of consent from the parties have been filed with the Clerk.

Both to advance the cause of civil rights and to help assure that all students have access to a quality public education, NEA is committed to achieving full and lasting integration of the nation's public schools. As part of this commitment, NEA opposes efforts by school boards, such as the effort by petitioner in this case, to resegregate previously integrated schools.[2]

NEA has filed *amicus curiae* briefs in several prior school desegregation cases in this Court, and regularly has participated in school desegregation cases in the lower federal courts.

STATEMENT

NEA agrees with the statement of the case set forth in the brief of respondents Robert L. Dowell, *et al.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner asserts that this case presents two principal issues, one having to do with whether the standards for vacating injunctions articulated in *United States v. Swift & Co.*[3] and its progeny are applicable to school desegregation cases, and the other having to do with the effect on a desegregation decree of a determination that a school district has attained "unitary" status. But these questions do not accurately reflect the substance of petitioner's quarrel with the position taken by the Court of Appeals.

Although petitioner and its supporting *amici* have extensively briefed both the *Swift* issue and the "unitari-

[2] The NEA Representative Assembly, which is the organization's highest governing body, has adopted a resolution entitled "Integration in the Public Schools." This resolution states, *inter alia*, that NEA "believes that it is imperative that full integration of the nation's schools be effected," and that "[t]he Association opposes any attempts to delay or impede implementation of desegregation orders and will, therefore, resist efforts of school boards to resegregate integrated schools."

[3] 286 U.S. 106 (1932).

ness" issue, they concede that in the final analysis a desegregation decree properly may be terminated *only* if all vestiges of the discrimination that gave rise to the decree have been eliminated. *See infra* at 5-8. But that is the very test that was applied by the Court of Appeals when it stated that a decree may be vacated once "the condition the order sought to alleviate, a constitutional violation, has been eradicated," Pet. App. 14a, such that the decree "is no longer necessary to achieve the court's original objective," Pet. App. 17a. Because petitioner's purported disagreement with the legal standard applied by the Court of Appeals informed the questions on which certiorari was sought and granted, and because subsequent briefing indicates that this disagreement is illusory, the writ should be dismissed as improvidently granted. (Part I).

Petitioner's basic quarrel is with the refusal of the Court of Appeals to accept its contention that all vestiges of Oklahoma City's former *de jure* segregation have been eliminated. Specifically, the question on which this case really turns is whether the District Court's finding that residential segregation in Oklahoma City today is largely the result of "personal preferences," Pet. App. 17b, amounts to a determination that the vestiges of *de jure* segregation have been eliminated, such that there is no longer any basis for a continuing injunction. Because this is not among the questions on which certiorari was sought and granted, and because the District Court's factfinding makes this case a particularly poor vehicle for considering the significance of continued residential segregation in determining whether a school desegregation decree should be terminated, it would be inappropriate for this Court to reach the issue. In the event the Court chooses to do so, however, we discuss the principles that should govern the analysis, and show why, on the basis of those principles, the decision of the Court of Appeals should be affirmed. (Part II).

ARGUMENT

I. THE LEGAL STANDARD ESPOUSED BY PETITIONER—THAT A DESEGREGATION DECREE MAY BE DISSOLVED ONLY IF ALL VESTIGES OF DISCRIMINATION HAVE BEEN REMOVED—IS THE STANDARD THE COURT OF APPEALS IN FACT APPLIED, AND THE QUESTIONS ON WHICH CERTIORARI WAS SOUGHT AND GRANTED ARE THEREFORE NOT PRESENTED HERE.

It is appropriate at the outset to make clear what is and is not before the Court in this case. The question is *not* whether there were circumstances warranting some *modification* of the original desegregation decree: the Court of Appeals was "satisfied the evidence reveals that because of population shifts in the District, it was necessary to modify the Finger Plan," Pet. App. 30a, and respondents themselves proposed certain modifications.[4] Nor does this case pose the question whether the District Court was required to engage in *ongoing active supervision* of the respondent school district. In school desegregation cases, as in others, the powers of a court of equity are "br[oad] and flexib[le]," *Swann v. Board of Education*, 402 U.S. 1, 15 (1971), and the Court of Appeals recognized that there may well come a point—which may in fact have been reached here—where a court should "curtail[] active supervision," Pet. App. 17a, n.17, without, however, vacating all injunctive re-

[4] Thus, although we believe that petitioner's broadscale attack on the compulsory busing of elementary school students is overblown, *see* Pet. Br. at 23-25; *see also* Brief of the Landmark Legal Foundation Center for Civil Rights as Amicus Curiae in Support of Petitioner at 10-20, this case does not present the question whether the District Court could or should have modified the busing requirements of the Finger Plan. The District Court dissolved the injunction in its entirety, and the question presented by the petition is whether the Court of Appeals erred in directing the District Court to consider modification rather than dissolution.

lief, *id.* What is at issue in this case is whether the circumstances were such as to warrant dissolution of the injunctive decree in its entirety.

In arguing that the Court of Appeals erred when it answered this question in the negative, petitioner purported in its Petition for Certiorari to find fault with the Tenth Circuit's reasoning with regard to two matters: (i) the standards that govern equity courts in considering requests for dissolution of a decree (the "*Swift* issue"), and (ii) the consequences of a determination of "unitariness." But now that the briefs are in it is apparent that petitioner does not actually disagree with the Court of Appeals as to the circumstances in which a school district should be found to be "unitary," or (what proves to be the same thing) the circumstances in which a desegregation decree may be dissolved. Rather, petitioner simply disagrees with the Court of Appeals' determination that the requisite circumstances—which petitioner defines in much the same terms as the Court of Appeals—were, as a matter of fact, not established here.

A. The "Swift" Issue

Petitioner states that one of the questions presented is whether "the traditional standard for dissolution of injunctive decrees involving private wrongdoers . . . govern[s] the dissolution of school desegregation decrees." Pet. Br. at i. *Amicus* DeKalb County Board of Education poses the question in similar terms. *See* Brief of the DeKalb County Board of Education as *Amicus Curiae* in Support of Petitioner ("DeKalb Br.") at i. Yet when all is said and done, neither petitioner nor its *amicus* ultimately contends that the standards for dissolution of an injunction that have been articulated by this Court in antitrust cases such as *United States v. Swift & Co.*, 286 U.S. 106 (1932) and *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968),

are inapplicable to school desegregation cases. *See* Pet. Br. at 35; DeKalb Br. at 17-18.[5] They argue rather that *Swift* should only be applied "as subsequently clarified by . . . *United Shoe Machinery Corp.*" Pet. Br. at 35. *See also* DeKalb Br. at 17-18. According to petitioner, *United Shoe* indicates that the strict test stated in *Swift*—*i.e.*, "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]," 286 U.S. at 119—is simply a way of saying that an injunction should not be terminated "if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." Pet. Br. at 36, quoting *United Shoe*, 391 U.S. at 248. *See* also DeKalb Br. at 18.

Whether petitioner's parsing of *United Shoe* is correct poses a difficult question, which is in no way unique to school desegregation cases but has vexed the lower courts in a wide range of contexts. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2961 at 601-03 (1973) (discussing divergent views as to whether, after *United Shoe*, a defendant seeking dissolution of an injunction must show both that the need for the injunction has disappeared *and* that the injunction is causing grievous harm). But that question is not presented here, because the Court of Appeals did *not*, as petitioner and its *amicus* wrongly assert, hold that a

[5] Nor could such an argument succeed. *Swift* and its progeny establish general principles respecting "the power of a court of equity to modify an injunction," *Swift*, 286 U.S. at 114; and "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16. Accordingly, as the Solicitor General correctly puts it, *Swift* "is no less applicable in the specific context of desegregation orders." Brief for the United States as Amicus Curiae ("U.S. Br.") at 18 n.7. *See Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 437 (1976) (invoking the "well-established rules governing modification of . . . a final decree entered by a court of equity," and citing *Swift*.)

school desegregation decree must continue after "the original constitutional violation has been remedied." DeKalb Br. at 2. *See also id.* at 7 ("In sum, the Tenth Circuit found that proof that a desegregation decree had successfully achieved its goal of eliminating discrimination root and branch was not a sufficient basis to dissolve an injunction"); Pet. Br. at 17-19, 36 (characterizing the decision below in similar terms). On the contrary, *the Tenth Circuit stated that the decree could be vacated if it were shown that "the condition the order sought to alleviate, a constitutional violation, has been eradicated."* Pet. App. 14a (emphasis added). *See also* Pet. App. 17a (decree may be modified or vacated if "a court determines the injunction in current form is no longer necessary to achieve the court's original objective").

Thus, the test proposed by petitioner and its *amicus*—*viz.*, that a school desegregation decree may be vacated once " 'the purposes of the litigation' as incorporated in the decree ha[ve] been 'fully achieved,' " Pet. Br. at 36, quoting *United Shoe*, 391 U.S. at 248 (or, as *amicus* DeKalb County puts it, "where the purpose of the injunction has been met and intentional (*de jure*) segregation and the effects of past intentional segregation have been eliminated," DeKalb Br. at 18)—is not inconsistent with the Tenth Circuit's analysis in this case. That court simply determined—correctly, as we show in Part II—that the constitutional violation has *not* been fully remedied and that an injunction therefore continues to be necessary.

B. The Consequences of a Determination of Unitary Status

For precisely the same reason, this case does not present the question posited by petitioner as to whether a desegregation decree "[s]hould . . . remain operative after a formerly *de jure* system achieves unitary status." Pet. Br. at i.

Petitioner's argument that "once a school system achieves a final declaration of unitary status . . ., then it is entitled to have the entire desegregation decree lifted," Pet. Br. at 27-28, rests on the following proposition: "[s]ince unitariness signifies the elimination of unlawful discrimination and its effects from a school system, it by definition means that the previous constitutional violation has been corrected." *Id.* at 18. *See also* DeKalb Br. at 18-19 ("Th[e] determination of whether a school system has become unitary . . . [turns on whether] the purpose of the injunction has been met and intentional (*de jure*) segregation and the effects of past intentional segregation have been eliminated"); U.S. Br. at 25 ("a school district seeking to be declared unitary must demonstrate that it has eliminated the vestiges of its prior acts of discrimination"); Brief *Amici Curiae* of the Council of Great City Schools, *et al.* ("Great City Schools Br.") at 11 (school district is not unitary until "the identified vestiges of segregation have been eliminated to the maximum extent practical").

Thus, petitioner couches its definition of unitariness in the same terms as it employs in describing the circumstances in which, under *Swift* and *United Shoe*, a court may dissolve a decree. *See supra* at 5-7. And properly so; for, as *amici* Great City Schools, *et al.*, correctly observe, "[t]he *Swift* issue and the unitariness issue are . . . fundamentally the same: has the condition necessitating judicial intervention been fully cured." Great City Schools Br. at 7. As we have seen, that is precisely the formulation articulated by the Tenth Circuit in this case; the Court of Appeals simply determined that the condition necessitating judicial intervention had *not* been fully cured.

In sum, the dispute that animates this case is not any question as to the standard that should govern requests for termination of a school desegregation decree. Despite much breast-beating by petitioner and its supporting

amici, the standard they articulate and the standard set forth by the Court of Appeals are essentially the same. What divides the parties is whether, on the facts here, that standard was correctly applied. Because this is not a question on which certiorari was sought and granted, we submit that the writ should be dismissed as improvidently granted.

II. THE QUESTION WHETHER THE COURT OF APPEALS PROPERLY ASSESSED THE EXTENT TO WHICH VESTIGES OF UNLAWFUL SEGREGATION STILL PERSIST IN THE OKLAHOMA CITY SCHOOLS IS NOT PROPERLY PRESENTED BY THIS CASE. BUT IF THE COURT WERE TO REACH THAT QUESTION, THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED.

A. The Posture of the Case

Petitioner and its *amici* read the District Court's decision as having found that in the five years between 1972 and 1977, the situation in Oklahoma City was transformed from one of "racial[ly] identi[fied] . . . schools" and "unpardonable recalcitrance," *Dowell v. School Bd. of Oklahoma City*, 338 F. Supp. 1256, 1271 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), to one in which "the effects of past discrimination ha[d] been eliminated," Pet. Br. at 18. *See also* DeKalb Br. at 8 ("'all vestiges of prior state-imposed segregation had been completely removed' from the school system by 1977"). The Court of Appeals reversed that finding as clearly erroneous because "*on the entire evidence* [it was] 'left with the definite and firm conviction that a mistake has been committed.'" Pet. App. 41a (emphasis by the court), quoting *United States v. United States Gypsum Co.*, 333 U.S. 363, 395 (1948).

Lurking in this disagreement between the two courts below is a question as to the significance of continued

residential segregation in determining whether a school desegregation decree should be terminated. This is a difficult and sensitive question which, we submit, the Court should not reach in this case. In addition to the fact that the question was not raised in the Petition for Certiorari, it was, as the following brief recapitulation of the District Court's decision indicates, essentially bypassed by that court.

In its first decision in this case, the District Court correctly observed that the central problem to be confronted in desegregating the Oklahoma City schools was that, as a result of intentional governmental action, *see Dowell v. School Bd. of Oklahoma City Public Schools*, 219 F. Supp. 427, 433-34 (W.D. Okla. 1963), "[t]he Negro people had been segregated so completely in their residential pattern," *id.* at 434. When, two years later, the court rejected petitioner's initial effort to adopt a "neighborhood school" policy, it did so because "a neighborhood school policy . . .. when superimposed over already existing residential segregation initiated by law in Oklahoma City, leads inexorably to continued school segregation." *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 976 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). The court emphasized that the "ghetto confinement of Negroes" in Oklahoma City, *id.* at 975 n.1, was "neither accidental nor fortuitous, but the result of laws requiring segregation in housing and education." *Id.* at 976. *See also id.* at 977 (noting that actions of the School Board had "serve[d] to . . . extend[] areas of all Negro housing, destroying in the process already integrated neighborhoods and increasing the number of segregated schools"). And, in 1972, when the District Court approved the Finger Plan, it found that the "racial identity of the schools" still remained, because of "the unpardonable recalcitrance of the defendant Board and the Superintendent of Schools to come forward with a constitu-

tional plan for the desegregation of the schools of this District." *Dowell*, *supra*, 338 F. Supp. at 1271.

In its most recent decision, issued on December 9, 1987, the District Court found that blacks are no longer forced by law or official policy to live in particular areas of Oklahoma City. According to the Court, the primary reason "why the east inner-city area in Oklahoma City [which the court had characterized as a "ghetto" in 1965] remains predominantly black today," Pet. App. 17b, with the result that petitioner's "neighborhood school" policy consigns 44.7% of the district's black students in grades 1-4 to schools with enrollments greater than 90% black,[6] is "personal preference," Pet. App. 17b. More precisely, what the court found is that "[a]s a result of personal preference, very few white families moved into the east inner-city area," *id.*

The District Court abandoned the inquiry at that point, as if the conclusion that "personal preferences" are at work forecloses any possibility that the present residential segregation is a vestige of governmental discrimination. What the court failed to consider is the obvious possibility, which is supported by the record in this case, *see infra* at 18, that the reason why white families have been unwilling to move to the northeast sector of Oklahoma City *is* that sector's status as a black ghetto—a status conferred by official action. To the extent that this is so, "personal preferences" produce residential segregation only because they are operating in a context where governmental discrimination has skewed the situation in the first place. Seen in this light, the notion that a school district can never be held accountable for the effects of "personal preferences" is simply a revival of the discredited notion that a school district can never be held responsible for the consequences of "freedom of choice." *See, e.g., Green v. County School Board*, 391 U.S. 430, 437 (1968).

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[6] *See* Plaintiffs' Exhibits 26 and 27.

Thus, the real question in this case is whether and to what extent the segregation flowing from the "personal preferences" to which the District Court referred is itself a vestige of the prior *de jure* segregation that the decree was designed to remedy. Because the District Court failed even to acknowledge—much less address—this question, the instant case provides a particularly poor vehicle for this Court to consider the significance of continued residential segregation in determining whether a school desegregation decree should be terminated. Should the Court conclude otherwise, however, and choose to address the matter, we set forth below the basic principles that we believe should govern the inquiry.

B. The Governing Principles

1. In crafting and administering school desegregation decrees, "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation," *Swann*, 402 U.S. at 15, and to do so "root and branch," *Green*, 391 U.S. at 438. As we have discussed, petitioner and its *amici* do not dispute that a desegregation decree should remain in force until this has been accomplished. *See supra* at 7-8.

2. It hardly can be denied that where residential segregation is traceable to official action, and a "neighborhood school" policy superimposed over that segregation results in consigning blacks to schools that are virtually all-black, the vestiges of discrimination have not been eliminated as required by *Swann* and *Green*. *See* Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 793 (1986). After all, the problem that gave rise to the initial decree in this case—as in *Swann* itself and in other cases such as *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33 (1971)—was that although *de jure* segregation had been abandoned, "[t]he Negro people had been segregated so completely in their residential pattern," *Dowell*, 219

F. Supp. at 434, that a neighborhood school policy would inevitably produce segregated schools. *See supra* at 10-11. If residential segregation stems from governmental action —be it that of the State or of the school district itself [7]—

[7] This Court has recognized that "school desegregation is a contributing cause of housing segregation," *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979), and that the actions of school officials may have "a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration in the schools." *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 202-03 (1973). *Accord, Swann*, 402 U.S. at 20-21. *See* U.S. Br. at 27. The District Court found in its 1965 decision that this phenomenon has been at work in Oklahoma City. *See supra* at 10. However, we hasten to add that this Court has never held that only the discrimination of school officials themselves, and not the discrimination of state or local governments, is relevant in this regard; and we submit that if residential segregation is caused by the action of *any* governmental entity a federal court is well within its power in prohibiting a school board from applying a neighborhood school policy under which that governmentally-fostered residential segregation will result in school segregation. In *Swann*, for example, the remedies of alteration of attendance zones and busing that were affirmed by this Court, 402 U.S. at 27-31, had been adopted on the basis of "[findings] that residential patterns leading to segregation in the schools resulted in part from *federal, state and local* governmental action." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 141 (4th Cir. 1970) (*en banc*) (emphasis added). Although this Court, in affirming those remedies, "[did] not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree," 402 U.S. at 23, neither this Court nor the lower courts in *Swann* found it necessary to determine *to what extent* the segregation at issue resulted from action of the school board rather than from other "federal, state and local governmental action," 431 F.2d at 141. Particularly in the case of discrimination by state and local governments which, while technically distinct from a school district, have a close relationship to and exert a strong influence on the district, there is no sound basis for holding that segregation caused by state or local authorities rather than by school authorities as such is beyond the pale of

a court plainly must adopt appropriate measures to ensure that it does not result in segregated schools. *See, e.g., Swann, supra; Davis, supra.*

3. To be sure, it often will be difficult to determine whether, and to what extent, a present pattern of segregation stems from past governmental action. But this Court's precedents make clear that the burden of proof is on a school district that has previously maintained a dual system to ests[a]blish that the present composition of the schools is not a result of the past discrimination. "[I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." *Swann*, 402 U.S. at 26. What the Court stated in *Keyes, supra*, with respect to an initial determination of liability, applies *a fortiori* in this context:

> In *Swann*, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention.
>
> * * * *
>
> We made it clear, however, that *a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist.* Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if *respondent School Board*

remedy in a school desegration case; and the remedies affirmed by this Court in numerous cases, including *Swann* and *Davis*, cannot be squared with such a proposition. If any doubt remains on this score, it should not be resolved in *this* case, where the matter has not been raised, and apparently will not be briefed, by the parties.

> cannot disprove [past] segregative intent, it *can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.* [413 U.S. at 210-11 (emphasis added)]

See also Dayton Bd. of Education v. Brinkman, 443 U.S. 526, 537-38 (1979) ("the systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts").[8]

4. These principles do not improperly infringe on the interest of a school district in maintaining a policy of neighborhood schools. "All things being equal, *with no history of discrimination*, it might well be desirable to assign pupils to schools nearest their homes," *Swann*, 402 U.S. at 28 (emphasis added); but where neighborhood schools perpetuate the effects of past governmental discrimination, relief is warranted, *id. See also, e.g., Davis v. School Comm'rs, supra.*

[8] In this connection, petitioner misrepresents the position of Justice Stewart when it quotes out of context the statement in his separate opinion in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) that "[a]n easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy." Pet. Br. at 41, quoting 443 U.S. at 478-79. Read in full, the passage to which petitioner refers does not support its position and is completely consistent with what we have stated in text:

> An easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy throughout a district. As *Dayton I* made clear, unless a school was affected by the violations, it should not be included in the remedy. I suspect the *defendants* in *Columbus might have been able to show that at least some schools in the district were not affected by the proved violations.* Schools in the far eastern or northern portions of the district were so far removed from the center of Negro population that the unconstitutional actions of the board may not have affected them at all. *But the defendants did not carry the burden necessary to exclude those schools.* [*Id.* (emphasis added).]

No one would deny the importance of allowing local authorities to manage the schools without *unwarranted* judicial involvement; but where governmental discrimination, even "remote[] in time," *Keyes*, 413 U.S. at 210, is responsible for the fact that a black student must attend a virtually-all-black school, a grievous constitutional wrong is inflicted. This Court has recognized that "minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 472-73 (1982). *See also Milliken v. Bradley*, 433 U.S. 267, 288 (1977). This does not mean that a federal court is free to require racially balanced schools where governmental discrimination is not the cause of an imbalance. *Spangler, supra; Swann, supra.* It does mean, however, that where a school district with a history of *de jure* segregation cannot adequately rebut the presumption that present segregative conditions are attributable to the past governmental wrongs, *see supra* at 14-15, a federal court should not hesitate to fashion a remedy.[9] One thing, at least, is worse than continued judicial involvement in the affairs of a school district, and that is for children to be deprived of the benefits of interracial education, and rendered unable to "achieve

[9] In *Swann*, the Court stated that in a system with a history of segregation, even "the existence of some *small number* of one-race, or virtually one-race, schools within a district," while not "in and of itself" unconstitutional, places on the district a burden of showing that the racial composition of the schools is not the result of present *or past* discrimination. 402 U.S. at 26 (emphasis added). Oklahoma City is operating a *significant* number of virtually one-race schools: indeed, as respondents have pointed out, the pattern of one-race schools that exists today is virtually identical to the pattern that existed when, earlier in the litigation, the District Court properly refused to allow a "neighborhood school" plan. And, petitioner has not made the showing required by *Swann* to justify such a situation.

their full measure of success," *Washington v. Seattle School Dist.*, 458 U.S. at 472, because of the continuing effects of governmental discrimination.

5. Nor do these principles call for decrees of inordinate duration; and there may well come a point when the link between residential segregation and past governmental discrimination, while not entirely broken, is so "attenuated" that a remedy is no longer warranted. *See supra* at 14-15, quoting *Swann* and *Keyes*. Petitioner failed to show, however, that this is such a case.[10]

[10] *See supra* note 9. The Solicitor General asserts, with particular reference to residential segregation, that "[w]here a school board has (1) faithfully complied with a decree over a continuous period, (2) engaged in no new discriminatory practices, and (3) eliminated the vestiges of discrimination in all of the areas identified in *Green*, the strong presumption should be that any further 'vestige' of discrimination has been attenuated." U.S. Br. at 28-29. We see no basis for any such presumption, "strong" or otherwise. That a school district has complied with a decree and has refrained from new acts of discrimination provides no reason to assume that residential segregation resulting from prior governmental discrimination has been "attenuated." As for the *Green* factors, they also shed no light on this question. The most relevant of the *Green* factors in this regard is "the composition of student bodies," 391 U.S. at 435. In *some* cases, the fact that student bodies have become racially mixed may suggest that prior governmentally-initiated residential segregation has dissipated. But in this case, to the extent that the elementary schools in the northeast sector were racially mixed at the time of the District Court's "unitariness" finding, this was largely due to busing, and it was a moral certainty that one-race schools would be restored as soon as busing ended (at least if no other remedy were fashioned). We are hard-pressed to see how a finding that student populations have become racially mixed can support a determination of "unitariness" justifying dissolution of a decree where the mixing results only from the very provisions of the decree that the school district seeks to vacate. After all, the moment a district begins to comply with a busing order, student populations become racially mixed. If such a condition were sufficient to support a finding of unitariness, desegregation decrees would immediately self-destruct. And in all events, whatever may be the legal consequence of a school district's compliance with a busing order, there is no

To the contrary, although the District Court made no findings regarding the extent to which the "personal preferences" that account for the residential segregation in Oklahoma City today produce that result only because of past *de jure* segregation, the evidence with regard to this issue (as to which petitioner bears the burden of proof, *see supra* at 14-15) suggests, if anything, that the connection is strong. Thus, petitioner's own witness, upon whom the District Court chiefly relied in discussing the role of these preferences, testified as follows:

> Q. And does it not therefore follow that, *to the extent past discrimination was a factor* in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?
>
> A. I think that you would have to agree with that, given what I've testified. Yes.[11]

In short, the record supports, and *nothing in the District Court's findings rejects*, the following chain of events: (1) a black ghetto was created in the northeast sector of Oklahoma City *through governmental action*,[12] (2) precisely because it *is* a black ghetto, whites, due to "personal preferences," have been and remain unwilling to move into that area of the city, and (3) *as a result*, if petitioner's "neighborhood school" policy is carried out

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basis in fact or logic for the Solicitor General's suggestion that such compliance should support a presumption that residential segregation, or other vestiges of discrimination, have been "attenuated."

[11] Transcript p. 107 (emphasis added). *See also id.* at 1231-32 (testimony of Professor Mary Lee Taylor) ("[I]n places like Oklahoma City, where the black neighborhood was created by state action . . ., white avoidance of desegregation would be particularly great for that reason. In other words, the official segregation encourages attitudes . . . that it . . . would be undesirable for whites to live in predominantly black neighborhoods.")

[12] *See supra* at 10-11.

and no countervailing injunctive relief is effectuated, black children living in the government-created ghetto will once again be sent to schools attended almost exclusively by one race.

To say that this governmentally-fostered segregation is no longer of any legal relevance because it continues to have effect only by operation of "personal preferences" is to argue nothing more nor less than that "freedom of choice" puts an end to the duty to desegregate. This Court's desegregation jurisprudence is dead set against that notion. *Green*, *supra*.

For these reasons, if the petition for certiorari is not dismissed as improvidently granted and if the Court addresses the issue of residential segregation, it should affirm the decision below on the ground that petitioner failed to carry its burden of proving that the resegregation of Oklahoma City's elementary schools is not the result of the past governmental discrimination that was established in the earlier stages of this litigation.

CONCLUSION

The petition for certiorari should be dismissed as improvidently granted. If the petition is not dismissed, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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